FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

NO. 229.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBIAN ENAMELING AND STAMPING COMPANY, INC.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR COLUMBIAN ENAMELING AND STAMPING COMPANY, INC.

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OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 415-425) is reported in 96 F. (2d) 948. The decision of the petitioner, National Labor Relations Board, appears in the record at pages 372 to 393.

JURISDICTION.

The decree of the United States Circuit Court of Appeals for the Seventh Circuit, denying the petition of the National Labor Relations Board, for enforcement of its order, was entered on April 28, 1938. The petitioner filed its Petition for Writ of Certiorari on July 28, 1938, which was granted on October 10, 1938. This Court's jurisdiction is based upon Section 240 (a) of the Judicial Code, as amended, and Section 10 (e) of the National Labor Relations Act.

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449; 29 U. S. C. A. Section 151, *et seq.*), involved herein, will be referred to in the Argument *infra*.

QUESTIONS PRESENTED.

1. Whether the petitioner's finding that the respondent refused to bargain collectively with the representatives of the strikers on or about July 23, 1935, is justified by the record.

2. Whether the occurrence of a strike in violation of a fair collective bargaining agreement prior to the passage of the National Labor Relations Act terminated the employment status of the strikers.

3. Whether the strike in this case was in violation of the collective bargaining agreement entered into between the respondent and its employees on July 14, 1934.

4. Whether the passage of the National Labor Relations Act created any duty upon the respondent to

argain collectively with the strikers or their represen-tatives.

5. Whether the petitioner's order that the respond-nt reinstate the strikers is remedial within the peti-oner's authority, or punitive and therefore outside of uch authority.

6. Whether the petitioner's order of reinstatement ill effectuate the policies of the Act.

STATEMENT OF THE CASE.

On March 23, 1935, the then employees of the re-pondent, who were members of a union, quit work in ccordance with a resolution which had been communi-ated to the respondent on March 17, 1935, the effective ortion of which was as follows:

> "RESOLVED, that the members of Federal Labor Union #19694, affiliated with the American Federation of Labor, believe that peace and harmony cannot exist under the present conditions, owing to the unfair practices of the company. We do hereby refuse to continue to work with anyone eligible for membership in our Union who does not show a willingness to become a member on or before March 23, 1935; * * *" (Petitioner's Exhibit 2, petitioner's brief, pages 50-52)

he Indianapolis Agreement and Collective Bargaining Meetings Prior to the Strike.

At the time of the aforesaid strike which resulted the closing of respondent's plant, there was in effect n agreement, hereinafter sometimes referred to as the Indianapolis Agreement," entered into on July 14, 1934 or a period of a year, between the respondent and

Enameling & Stamping Mill Employees' Union #19694, hereinafter called the "Union," and negotiated by Dr. Earl R. Beckner, then director of the Indianapolis Regional Labor Board. The Agreement, respondent's Exhibit "A" (R. 15-18), provided for the preservation of the open-shop principle in the respondent's plant in the following language:

> "(3) No employees have been or will be discriminated against because of his or her membership in or non-membership in, affiliation with or non-affiliation with any union or labor organization."

The Agreement also provided for arbitration of disputes arising thereunder and that pending arbitration of such disputes, there were to be no stoppages of work by either party. The Agreement further provided for the recognition of seniority rights; for the maintenance of specified working conditions; for notice to the other party of a desire for termination or modification of the Agreement; for the spreading of work; for a method by which a person could appeal from a dismissal he deemed to be unjust; for minimum pay to employees required to report for duty; for increased pay under certain conditions; for machinery for the handling of grievances; and for the maintenance of an eight-hour working day. In fact, as the Court below has found (R. 422), the Indianapolis Agreement was a "specific agreement, reasonable in time and in conditions and not violative of statutory law nor of public policy."

The respondent and the Union conducted their relations under the Indianapolis Agreement during the period from July 14, 1934, to March 23, 1935. During that period representatives of the respondent met with representatives of the Union in at least eleven separate collective bargaining meetings (R. 120, 188; 120, 189;

90; 122; 198; 203; 311; 205; 313; 209; 211). In most ases, these meetings resulted from a written request f the Union to the respondent (R. 197, 203, 204), to vhich the respondent readily assented as is shown by he frequency of the meetings. This is of importance in ur later discussion of the evidence of the alleged re- uest for a meeting on July 23, 1935. The discussions t these meetings covered a wide range of topics consist- ng usually of demands advanced by the Union.

One of the demands in one of the earlier meetings or collective bargaining was for the institution of the heck-off system for the payment of Union dues and ssessments, whereby the amounts of such items should e deducted from wage payments and paid directly by he respondent to the Union. This was a subject of dis- ussion at four of the collective-bargaining meetings ver the period from August 8, 1934 to September 21, 934 (R. 188; 189; 190; 122).

The Indianapolis Agreement made no reference to he check-off, and for that reason alone the respondent night have refused to consider the subject. That, how- ever, was not its attitude with respect to this or any ther demand of the Union.

The respondent considered the check-off demand arefully from the standpoint of legality, administra- ion and expense (R. 189, 191) and notified the Union f its position as influenced by those considerations. The respondent advised the Union it would institute the heck-off system under certain conditions, *inter alia,* hat it would have to receive pay deduction authoriza- ions from its employees for each semi-monthly deduc- ion (letter of September 18, 1934, Respondent's Exhibit 5, Petitioner's Brief, pages 66, 67), whereas the Union vanted one deduction authorization for the entire pe- iod of the Indianapolis Agreement (R. 190, 191). At

the collective bargaining meeting of November 26, 1934 (R. 198), one T. N. Taylor, an organizer for the American Federation of Labor and President of the Indiana Federation of Labor (R. 196), stated that the matter of a check-off system might be forgotten by the respondent (R. 201), and accordingly it was not thereafter the subject of discussion or demand by the Union at any meeting for collective bargaining purposes.

Another matter of bargaining under the Indianapolis Agreement arose out of the demand by a few of the employees for two hours' pay for a day when the power house broke down and they were unable to work (R. 205). The respondent called the committee's attention to the statement of Dr. Beckner, made when the Indianapolis Agreement was being negotiated, that he would not include in the Agreement a provision holding the company responsible for the payment of wages to employees during periods of idleness attributable to breakdowns of machinery, on the ground that such a provision would be unfair and unjust, which it obviously would be (R. 187). No such provision was included in the Indianapolis Agreement and the respondent's refusal to pay wages to the few men concerned for the day mentioned, as well as its refusal to submit the proposal to arbitration was entirely justified as in reality the proposal was for a change in the terms of the Agreement and not for arbitration of a dispute arising thereunder. The petitioner's brief (page 24, note 8) in discussing this subject completely ignores this background upon which the respondent's action was justifiably based.

The demand most frequently discussed, and which finally led to the strike, was the Union's demand for a closed shop. This demand first appeared at the meeting at which the Indianapolis Agreement was negotiated and signed. It was in the form of a statement by at

least one of the Union committee members of refusal to work with a so-called "scab" (R. 187). This sentiment did not prevail, however, and the Indianapolis Agreement, as aforesaid, adopted the open-shop principle. The demand next appeared in October 1934 in the form of a resolution, communicated to the respondent by the Union, to the effect that members of the Union must be in good financial standing under penalty of loss of membership rights (Respondent's Exhibits 6 and 9, petitioner's brief, pages 67, 68; 71). If this resolution involved simply a matter of internal management of the Union, not calculated to affect the delinquent members' employment status, communication thereof to the respondent would have been meaningless.

In the collective bargaining meeting held on November 26, 1934, which resulted from a written request by the Union to discuss modification of the Indianapolis Agreement (Respondent's Exhibit 11, petitioner's brief, page 72), the President of the Indiana Federation of Labor who acted as the Union spokesman stated that, "The Union does not want very much and you can grant it if you wish, very readily. What the Union would like to have *is a closed shop.*" (R. 199). This demand for modification and the other demand, viz., for a 20% wage increase, were refused by the respondent. At the close of the meeting the Union spokesman stated that the Union had no demands (R. 201).

The closed-shop demand reappeared, however, in the Union's proposals of January 4, 1935 (Respondent's Exhibit 1, Petitioner's Brief, pages 65, 66). The petitioner (in a footnote to page 5 of its brief) disagrees with the finding of the Court below (R. 416) that such was the fact. It is true that in form it was a proposal that the respondent should lay off employees suspended from the Union, but obviously the closed-shop was the objective

of the proposal. The respondent answered the Union's proposals of January 4, 1935 at the collective bargaining meeting on January 21, 1935, and, with reference to the lay-off of suspended members of the Union, stated that suspension was purely a Union function and that it would not undertake to discipline its employees because they were suspended by the Union (Petitioner's Exhibit 1, Petitioner's Brief, pages 44-49).

At the collective bargaining meeting of March 11, 1935 there was discussed the submission to arbitration of the Union's aforesaid proposals of January 4, 1935. The respondent again stated its position with respect to lay-off of employees suspended from membership in the Union, that question being presented by the Union spokesman and by four of the Union committee members (R. 211-212).

Petitioner's Exhibit 2, the Union resolution to refuse to work with non-Union employees (quoted *supra* at page 3), was the next communication received from the Union (R. 213) and the strike was called six days later, viz., March 23, 1935 (R. 213), *over three months before the expiration of the Indianapolis Agreement, and likewise more than three months before the National Labor Relations Act was enacted and approved.*

On the date of the strike, a conciliator of the Department of Labor called on respondent and stated that *all the Union wanted was a closed shop and that that was not an unreasonable demand.* The respondent, consistently with the Indianapolis Agreement, rejected this proposal, however, and the conciliator gave up his attempt to settle the strike (R. 383).

Over two and a half months later, viz., on June 11, 1935, the strike continuing meanwhile, the Union's written request (Petitioner's Exhibit 4) for a meeting to

discuss settlement of the strike was granted by respondent (R. 140). At this meeting *a Union representative stated that although wages and working conditions were satisfactory, the Union did not think it fair to its members to have a few non-Union members enjoying the alleged benefits of the Union without paying dues to the Union* (R. 301).

Despite this overwhelming testimony on the subject, the petitioner has the temerity to assert that the closed-shop was at all times, and certainly prior to the strike, a minor issue, and that wages were the basis of dispute (Petitioner's brief, pages 20, 21, 25, 39).

As we have stated, the open-shop principle was incorporated in the Indianapolis Agreement. The Union later sought modification of the Agreement to provide for the establishment of a closed shop. Failing to secure modification, it attempted to reach its end by having the respondent lay off suspended members. The respondent's refusal to accede to this demand was entirely proper as it was in contradiction of the Indianapolis Agreement. The Union's request that this proposal be submitted to arbitration was also properly refused as this could not conceivably be "a dispute arising under" the Agreement, which, by the terms of paragraph (10) (R. 17) was the condition of the submission to arbitration of disputes.

For the sake of clarity, it should be pointed out that the respondent's position with respect to the submission to arbitration of each of the Union's proposals of January 4, 1935 (See Petitioner's Exhibit No. 1, Petitioner's Brief, page 44), was that, in certain instances, the proposals were in accord with the respondent's policy, and therefore involved no dispute; and that in all other instances, the proposals were not subjects of dispute arising under the Agreement. An examination of Petition-

er's Exhibit No. 1 (Petitioner's Brief, page 44) shows the complete justification for respondent's position in this regard. The petitioner made no finding that the proposals were arbitrable. Moreover, the finding of the Court below that the Union breached the agreement by striking, necessarily involved a finding that the respondent was not in default under paragraph (10) of the Agreement.

A brief resumé of the facts connected with the conduct of the strike and the reopening of respondent's plant may assist this Court in its determination of the questions here involved. The respondent's closed plant was picketed more or less constantly from March 23, 1935, until July 22, 1935 (R. 217) when martial law was declared in Terre Haute and Vigo County, Indiana (R. 217).

The respondent offered to prove, but the Trial Examiner refused to admit testimony to the effect that on June 15, 1935, eight residents of Vigo County who had been sworn in as Special City Police were moved into the plant for the purpose of protecting the property; that at that time and during the afternoon and evening picketing by strikers and others was in progress; that during the evening large crowds gathered; that during the early morning hours of June 16, 1935, the office building of the respondent's factory was raided and wrecked; and that portions of the factory buildings were also raided and serious damage done therein (R. 220).

On July 19, 1935, the respondent sent some additional watchmen, about 40 or 50 in number, into the plant for purposes of protection (R. 70, 71, 221).

On July 22, 1935, a general strike or labor holiday took place in Terre Haute (R. 67). Two or three hundred strikers and about fifteen thousand other persons

(R. 231) were gathered around the respondent's plant and it was the target for some 200 missiles consisting of rocks, spikes and bolts (R. 234), which inflicted serious damage and endangered the lives of the watchmen and executives. Martial law was declared that day (R. 72) and militia arrived at the plant that evening (R. 235).

On the morning of July 23, 1935, the respondent's factory was reopened and it has been in continuous operation ever since (R. 238). By the second week of September (not the middle of September as stated at page 7 of the petitioner's brief) the respondent had a complete force of satisfactory employees (R. 239), including many former employees (R. 242).

All of the former employees were offered employment by the respondent without any discrimination because of participation in the strike (R. 67; 88; 140) and could have returned to work, but those disgruntled former employees for whom this proceeding is sponsored, refused to accept the offer. Relations at the respondent's plant at the present time are peaceful and harmonious, and the level of operation is commensurate with the existing demand for the respondent's products.

The statement of the case contained in the petitioner's brief creates the impression, pages 6 and 7, that the respondent took back the strikers on and after July 23, 1935, only on the condition that there would be no union recognition or agreement. There is no evidence in the record that there were any conditions imposed by the respondent upon the reemployment of strikers when it opened its plant. The petitioner's reference is to what it found the respondent's position to be prior to July 5, 1935. Indeed, at page 27 of its brief, the petitioner states that the aforesaid "term of settlement" insisted

on by the respondent necessarily ceased to be part of the dispute after July 5, 1935.

The hearing conducted before a Trial Examiner of the petitioner was concluded on December 11, 1935 (R. 370). On December 16, 1935, for reasons not appearing in the record, the proceeding was transferred to and continued before the Board (R. 370). Presumably, the Trial Examiner who heard the witnesses, had no part in finding the facts; whereas the Board, without the benefit of hearing the witnesses, or the opportunity to judge their credibility, made its own findings and issued its decision and order on February 14, 1936. *Seventeen months later* the petitioner filed its petition in the Court below for enforcement of its order. After the entry by the Court below of its decree on July 28, 1938, denying enforcement, the petitioner delayed until the last day permitted by law to petition this Court for a writ of certiorari. This case is now before this Court nearly four years after the men, whom the petitioner seeks to reinstate, voluntarily left their jobs and more than three and a half years after they could have gone back to work if they had wished to do so.

Petitioner's Conclusions of Law, and Order.

The petitioner has found that:

> "On or about July 23, 1935, the respondent refused to bargain collectively with the Union as the representative of its employees, or at all, and by reason of such refusal has engaged in an unfair labor practice within the meaning of Section 8, subdivision (5)." (R. 392).

In our argument we will have something to say regarding the unfairness of the Board's attitude in various respects, including its action in seizing upon a single

date as proof of refusal to bargain despite the previous months of repeated bargaining meetings, and despite the fact that an impasse had been reached on the closed-shop issue. Here, however, we want simply to urge upon the Court the importance of examining the record to ascertain whether there is *any* evidence to support this finding.

Mr. Gorby, president of the respondent, when called by the petitioner, testified that on July 23 or 24, 1935, Messrs. Richardson and Scheck, conciliators of the Federal Department of Labor, asked him if he would meet with them and with the Scale Committee of the Union. He was asked by counsel for the Union if the Labor Department conciliators stated for what purpose they were requesting that he meet with the Scale Committee. He answered that they did not (R. 303, 304). He testified that he told them he would meet with them and with the Scale Committee but that no meeting was arranged; that several days later he called Mr. Richardson and told him that he would not meet with him or with the Scale Committee (R. 304, 305).

At the close of Mr. Gorby's examination by counsel for the petitioner, counsel for the respondent moved that the testimony of Cox and Heuer, two witnesses for the petitioner, with reference to Messrs. Richardson and Scheck, be excluded, on the ground that, in talking to Mr. Gorby on July 23 or 24, 1935, Richardson and Scheck had not in any manner, shape or form indicated to him that they had come there with a request from the Union for a meeting between Mr. Gorby and the Scale Committee. Decision of the motion was postponed by the Trial Examiner (R. 307), and was never acted on by him.

The testimony of Cox (R. 72, 75) and Heuer (R. 143, 144), referred to in the motion to exclude, men-

tioned in the foregoing paragraph, was to the effect that the conciliators had contacted the Scale Committee; that they had been requested by the Committee to try to open up negotiations with respondent; and that the conciliators later reported back to the Committee that they were not able to arrange a meeting. When this testimony was offered, counsel for respondent objected to it as not binding upon the respondent (R. 72, 143), not having transpired in respondent's presence. The Trial Examiner admitted the testimony of each of these witnesses on the assurance that it would be connected up by showing that the request of the Committee was communicated to the respondent. Failing that, it was to be excluded (R. 75, 143). Neither Richardson nor Scheck were produced, nor was any other connecting evidence offered. Upon his own statement, therefore, the Examiner should have excluded the testimony of Cox and Heuer. As aforesaid, however, he never acted upon the motion to exclude.

From the foregoing testimony of Mr. Gorby, coupled with that of Cox and Heuer, the petitioner inferred that Mr. Gorby knew that the request for a meeting was that of the Union. It, therefore, held that the testimony which respondent had objected to, and had moved to exclude was properly part of the record. (See Footnote (3) on page 385 of the record.) We shall take up this defect in the petitioner's proof in our argument.

The petitioner, in addition to ordering the respondent to cease and desist from refusing to bargain collectively with the Union as the representative of its employees, also ordered the respondent to

> "Discharge from its employment all production employees who were not employed by it on July 22, 1935, and reinstate to the vacancies so created individuals who were so employed and have not since

received substantially equivalent employment elsewhere and place the remainder of such individuals on a list to be called for reinstatement as and when their labor is needed."

The Court below refused enforcement on the ground that by leaving their employment in face of their agreement, the strikers did not come within the rule of the cases holding that an ordinary strike does not interrupt a previously existing employer-employee relation (R. 420). The decision of the Court below will be dealt with more fully in the Argument section of this brief.

SUMMARY OF THE ARGUMENT.

Point I.

There Is No Substantial Evidence to Support the Petitioner's Finding That the Respondent Violated the Act on or About July 23, 1935.

A.

THE FINDINGS OF THE PETITIONER ARE NOT CONCLUSIVE UNLESS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The word "evidence" as used in Section 10 (a) of the Act has been interpreted by this Court and nearly all of the Circuit Courts of Appeals to mean *substantial evidence,* a mere scintilla of evidence being insufficient. *Consolidated Edison Company of New York, Inc., et al., v. National Labor Relations Board,* No. 19 October Term, 1938, decided December 5, 1938.

B.

THE FINDING BY THE PETITIONER THAT THE RESPONDENT VIOLATED THE ACT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

An examination of the evidence upon which the petitioner based the crucial finding in this case reveals that it is of the flimsiest and most unreliable nature. The petitioner has piled inference upon inference in order to find that the respondent refused to bargain with the Union on July 23, 1935. In doing so it failed to give any consideration to the extensive prior bargaining relations between the respondent and the Union; or to the established custom of the Union in reducing to writing their requests for bargaining meetings.

C.

THE RESPONDENT WAS UNDER NO DUTY TO CONTINUE TO MEET WITH THE UNION ON JULY 23, 1935, AS NEGOTIATIONS TO SETTLE THE STRIKE HAD REACHED AN IMPASSE.

The existence of an impasse in negotiations relieves an employer from the duty to bargain collectively with the representatives of his employees. There was an impasse on the closed shop issue in the case at bar which was in existence at the time of the alleged request of the Union for a meeting to settle the strike. The respondent, therefore, was under no duty to continue to meet with the Union on or about July 23, 1935, even assuming that the strikers were employees.

Point II.

The Strike Was in Violation of the Indianapolis Agreement and Terminated the Employment Status of the Strikers.

A.

THE STRIKE WAS IN VIOLATION OF THE INDIANAPOLIS AGREEMENT

The Indianapolis Agreement was in full force and effect up to March 23, 1935, the date of the strike. It provided that it should be in force until July 14, 1935. The strike of March 23, 1935, called by the Union to enforce its demand for a closed shop, was a violation of the Agreement, inasmuch as the demand was in derogation of that provision of the Agreement preserving the open-shop principle.

B.

THE STRIKE WAS UNLAWFUL AND THEREFORE OPERATED AS A TERMINATION OF THE EMPLOYMENT STATUS OF THE STRIKERS.

The strike occurred prior to the passage of the National Labor Relations Act, and that Act, even if it can be said to continue the employment status of those who engage in an unlawful strike after its passage (and this is seriously doubted) cannot have any application to events at the time of the strike in this case. There was no Federal statute to keep the employment status alive, and under common law, an illegal strike terminated the employment status of those who engaged therein. *Michaelson v. United States, ex rel. Chicago, St. P., M. & O. Ry. Co.*, 291 Fed. 940 (C. C. A. 7th, 1923). Under the Act, the same result should follow, for if agreements, reached as a result of collective bargaining, may be repudiated at will by the parties, the fundamental policy of the Act will be thwarted.

Point III.

Upon the Passage of the Act the Strikers Were Not Employees and the Respondent Was Not Under a Duty to Bargain Collectively With Them or With Their Representatives.

A.

UNDER THE ACT THE DUTY IMPOSED UPON AN EMPLOYER IS THAT HE BARGAIN WITH HIS EMPLOYEES OR THEIR REPRESENTATIVES.

The petitioner concedes (Petitioner's brief, page 16) that if the strikers were not employees within the meaning of the Act at the time of the alleged refusal to bargain, the respondent was under no duty to bargain with the Union. This is a necessary concession under the Act.

B.

THE STRIKERS HAVING CEASED TO BE EMPLOYEES PRIOR TO THE PASSAGE OF THE ACT WERE NOT TRANSFORMED INTO EMPLOYEES UPON ITS PASSAGE.

Although the definition of "employees" contained in the Act may be literally broad enough to include persons who strike in violation of a collective bargaining agreement after the passage of the Act, it cannot be interpreted to include persons who ceased to be employees prior to the passage of the Act.

Point IV.

The Order of the Petitioner Is Not Within Its Powers Under the Act and Enforcement of the Order Was Properly Denied by the Court Below.

A.

THE ORDER DISREGARDS THE LIMIT UPON THE PETITIONER'S AUTHORITY.

Under the Act as interpreted by this Court, the respondent was free to employ persons to take the place of the strikers until it committed an unfair labor practice, yet the petitioner has ordered the respondent to discharge men it employed prior to the alleged commission of any alleged unfair labor practice and has ordered the respondent to reinstate strikers to the vacancies so created. The provision of the order requiring the respondent to cease and desist from refusing to bargain collectively with the Union likewise disregards the limit upon the petitioner's authority since the petitioner admitted that it did not know whether the Union represented a majority of the respondent's employees at the date the order was made (R. 391).

B.

NO PART OF THE PETITIONER'S ORDER WILL EFFECTUATE THE POLICIES OF THE ACT.

The petitioner is empowered to order such affirmative action as will effectuate the policies of the Act. It may not issue a punitive order. The petitioner's order of reinstatement was punitive, and out of all proportion to the respondent's alleged violation of the Act. Its enforcement at this late date would be even more punitive in effect. The cease and desist provision of the order is also unwarranted. If three years ago petitioner did not

know whether the Union would represent a majority of the respondent's employees, upon the reinstatement of the strikers to the positions they formerly held with the respondent (R. 391), certainly such knowledge is not now available, and for lack of it the cease and desist order is improper.

ARGUMENT.

Point I.

There Is No Substantial Evidence to Support the Petitioner's Findings That the Respondent Violated the Act On or About July 23, 1935.

A.

THE PETITIONER'S FINDINGS OF FACT ARE NOT CONCLUSIVE UNLESS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The National Labor Relations Act provides in Section 10 (e):

> "* * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *"

This Court has interpreted the quoted clause to mean that the petitioner's findings shall be conclusive only if supported by *substantial* evidence. *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142 (1937); *Consolidated Edison Company of New York, et al. v. National Labor Relations Board*, No. 19, October Term, 1938, decided December 5, 1938.

In the latter case this Court cited with approval decisions of several of the Circuit Courts of Appeals that have considered the quality of evidence needed to make

the petitioner's findings conclusive. In ***Appalachian Electric Power Co. v. National Labor Relations Board,*** 93 F. (2d) 985 (1937), the Circuit Court of Appeals for the Fourth Circuit applied, at page 989, the "directed verdict" test, saying:

> "* * * The rule as to substantiality is not different, we think from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict. In either case, substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; *and the test is not satisfied by evidence* which merely creates a suspicion or which amounts to no more than a scintilla or *which gives equal support to inconsistent* inferences. * * *." (Emphasis ours)

The suggestions of the Court in *National Labor Relations Board v. Thompson Products, Inc.,* 97 F. (2d) 13 (C. C. A. 6th, 1938) are helpful. It said, page 15:

> "'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. *It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom* and, considering them in their entirety and relation to each other arrives at a fixed conviction.
>
> "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. *Testimony is the*

raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought." (Emphasis ours)

The position taken by the Circuit Court of Appeals for the Second Circuit in *Ballston-Stillwater Knitting Co. v. National Labor Relations Board,* 98 F. (2d) 758 (1938) was that although it was not at liberty to make its own findings, neither was it "bound to accept findings based on evidence which merely creates suspicion or gives rise to an inference that cannot reasonably be accepted. * * *" (Page 760).

We respectfully request this Court to examine the record in this case with a view to determining whether petitioner's findings are supported by "substantial evidence."

B.

THE FINDING BY THE PETITIONER THAT THE RESPONDENT VIOLATED THE ACT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The petitioner has found that the respondent refused to bargain with the Union on or about July 23, 1935, and upon that finding has based the principal provisions of its drastic order. The obvious reason for the petitioner's selection of this date is that such *date is the only time subsequent to the effective date of the Act that any claim of refusal to bargain can possibly be conjured up to justify the order against the respondent.* This finding sweeps aside as irrelevant and unsubstantial the whole course of dealings between the respondent and representatives of the Union, from the inception

the Indianapolis Agreement in July, 1934, to March , 1935, the date of the strike, and thereafter.[1]

However, there is no evidence in the record of any fusal by the respondent of a *request of its employees* r a meeting for collective bargaining purposes. The ckground of the situation on July 23, 1935, must be pt in mind. A strike had been in progress for a period four months. The strike had been called because the embers of the Union refused to work with non-union embers, in direct violation of the existing Indianapolis greement and the provisions of paragraph 3 thereof R. 16). There may have been other reasons stated for e strike, but they were merely pretexts; the real rea- n was the controversy between those who were and ose who were not union members. The respondent as involved only because it refused to surrender to the nion's demands that it break its collective bargaining ntract, throw overboard the open-shop principle and scriminate against certain of its employees who were nwilling to join and pay dues to the Union.

The resolution passed by the Union on March 17, 35, just preceding the strike, leaves no room for doubt this point, viz.:

> "RESOLVED, that the members of Federal Labor Union #19694, affiliated with the American Federation of Labor, believe that peace and harmony cannot exist under the present conditions, owing to the

1. The petitioner at the hearing examined into transactions that curred prior to July 5, 1935, in order to establish a course of conduct R. 75). Upon finding that the course of the respondent's conduct was bargain collectively with the Union upon request, usually in writing, e petitioner promptly ignored this important element in the case, as it as inconsistent with the result the petitioner desired to reach.

> unfair[2] practices of the company. We do hereby refuse to continue to work with anyone eligible for membership in our Union who does not show a willingness to become a member on or before March 23, 1935; * * *"

It is true that this resolution was prefaced by certain recitals charging the respondent with violating the Indianapolis Agreement, but these recitals were merely self-serving declarations and the charges therein were entirely false.

Furthermore, at the meeting of June 11, 1935, following the strike, there was no controversy as to wages or working conditions (R. 244); again, the only controversy was between the union and the non-union employees as evidenced by the Union's arguments in favor of and demands for a closed shop. Those demands were again definitely refused by the respondent, and properly so under the Indianapolis Agreement.

Coming now to the alleged refusal to meet on July 23, 1935: we submit that there is not the slightest evidence in the record that the Union, or its representatives, requested the respondent to meet with it for bargaining purposes on that day. Certain evidence with respect to the matter, which evidence as we have shown,

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2. "'In reference to the word "unfair," it clearly appears that, as employed by defendants and labor organizations generally, it has a technical meaning well understood by the plaintiff and by all the persons to whom the council sent notices that plaintiff had been declared unfair. Such declaration means, and in this instance was understood by all the parties concerned to mean, *not that the plaintiff had been guilty of any fraud, breach of faith, or dishonorable conduct, but only that it had refused to comply with the conditions upon which union men would consent to remain in its employ* or handle material supplied by it.'" (Italics supplied). *Greenfield v. Central Labor Council*, 104 Ore. 236, 255, 256. Citing *Parkinson Co. v. Building Trades Council*, 154 Cal. 581.

supra, page 14, was admitted by the Examiner upon a condition which was not met by the petitioner, was that two Department of Labor Conciliators contacted the Union, that the Union requested the conciliators to try to open up negotiations with respondent, and that the conciliators later reported to the Union that a meeting with respondent could not be arranged (R. 72-75; 143, 144). *These conciliators did not, nor did anyone else,* advise respondent that they were acting for the Union upon a request by the representatives of the Union for a collective bargaining meeting. Admittedly, the conciliators were the moving parties, not the Union, and the only reasonable inference from such testimony is that the Department of Labor was intervening to settle the strike and was requesting a joint meeting with the respondent and the representatives of the Union. The finding of the petitioner referred to hereinabove, upon this testimony, that respondent knew it had been requested to bargain collectively, is wholly unwarranted. The petitioner reveals the weakness of this inference in the footnote to this part of its findings on page 385 of the record:

> "The respondent objected to this testimony on the ground that the conversation between the union and the conciliators does not 'bind' the respondent, and again on the ground that it does not appear that the conciliators told Mr. Gorby that the Union had made a request for the meeting. Mr. Gorby testified that the conciliators asked him to meet with the Scale Committee and that he knew the purpose of the requested meeting. *Since it appears that the conciliators were entrusted by the Union with a mission, duly met with the respondent in pursuance thereof, and reported back to the Union as to the result, it is a proper inference that Mr. Gorby knew of their trust.* Consequently, the evidence of the

witnesses Cox and Heuer, to which objection was taken, is properly part of the record." (Emphasis ours).

The foregoing excerpt of the petitioner's findings of fact does violence to fundamental principles of evidence, by piling inference upon inference. It is indicative of the bias and prejudice with which the petitioner has viewed and determined the issues in this case. We respectfully request this Court to give especial attention to the underscored portion of the excerpt. It reveals the petitioner's method of reasoning and condemns the finding as wholly unwarranted. We submit that by this finding the petitioner in effect holds as follows:

> "Since it appears that the conciliators were entrusted by the Union with a mission, of which Mr. Gorby knew nothing, duly met with Mr. Gorby in pursuance thereof without revealing to him that they had been entrusted with a mission and were fulfilling it, and reported back to the Union as to the result, likewise without Mr. Gorby's knowledge, it is a proper inference that Mr. Gorby knew of their trust."

This finding of the petitioner also does outrage to all familiar principles of logic and common sense. The conciliators were Federal officers acting in pursuance of their duty to settle a controversy between the Union and the respondent. They were not agents of the Union, but rather interested third parties. With all due respect to the majority of the Court below, the respondent was under no legal duty either before or after the Act to enter negotiations at the request of these conciliators. Its legal duty under the Act is to meet with those representing a majority of its employees.

The meeting requested by the conciliators was to be trilateral. We submit that from the evidence it is a reasonable and fair inference that Gorby knew that the request for a meeting was the request of the conciliators in the line of their duty. The petitioner seems to rely heavily on the fact that Gorby stated at the hearing that he knew the purpose of the proposed meeting. Naturally he would, but it is not natural that he would know that the request made by the conciliators was made on behalf of and at the instance of the Union. *It is worthy of notice that the petitioner failed to call the conciliators as witnesses, or to support the testimony of Cox and Heuer in any manner as the Examiner had required.*

Taking the view of the evidence most favorable to the petitioner, we submit that it does no more than give equal support to inconsistent inferences. This is not substantial evidence, and does not satisfy the requirements of the Act. *Appalachian Electric Power Co. v. National Labor Relations Board, supra.* The petitioner's finding that the respondent refused to bargain with the Union is not conclusive on this Court, and should be disregarded.

Before concluding our argument on this point, we feel it proper again to call to the attention of the Court the fact that nearly all of the important collective bargaining meetings of which there is evidence in the record, from the inception of the Indianapolis Agreement in July, 1934, through the meeting of June 11, 1935, were held as the result of written requests, or other communications transmitted through the mails, from the Union to the respondent. (See, for example, Respondent's Exhibit 11, Petitioner's Exhibit 9, Respondent's Exhibit 14, Petitioner's Exhibit 10, printed in the

appendix to the Petitioner's Brief, at pages 72, 54, 73 and 55 respectively, and Petitioner's Exhibit 4, and Respondent's Exhibit 13 printed in the appendix to our brief at pages 63 and 62 respectively). In addition, the Union's requests for meetings that were made in September and October, 1935, were in writing (Petitioner's Exhibits 5 and 6, printed in the appendix to our brief at pages 64 and 65). This well-established custom of written communication was not observed in the alleged request for a meeting on July 23, 1935, and this should be very persuasive on the question of whether there was such a request, especially in view of the doubtful character of the evidence on the subject.

It is not disputed that the Union wrote to the respondent on September 20, 1935, requesting the respondent to meet with it, or that the respondent did not reply to the letter. Here the petitioner could have found a refusal to bargain with the Union, but did not do so for the obvious reason that respondent then had a full force of employees, whose discharge could not be ordered to make jobs for the strikers. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938); *Black Diamond S. S. Corp. v. National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2nd, 1938). The petitioner, therefore, chose to rely upon a refusal to bargain of its own creation, which the record does not sustain.

We shall now turn to the petitioner's finding that the respondent violated Section 8, subdivision (1) of the Act on or about July 23, 1935, by soliciting strikers to return to work (R. 385, 386). The petitioner has not based any part of its order on this alleged violation, so we shall confine our discussion to a consideration of the evidentiary support for the finding.

The petitioner cannot seriously contend that sug-ting to a few individuals that they should come back work, after an unjustifiable strike, is a violation of Act. This finding and conclusion, if sustainable in event, must rest upon the testimony of two persons o testified that they were told, upon being requested return to work, that there would be no union. The persons referred to are James Hough, whose testi-ny appears in the record at pages 154 to 160, and ul Steuerwald, whose testimony appears in the record pages 100 to 112.

Steuerwald's statement can be dismissed summarily ause he testified that he was told there would be no on on or about the 20th day of May, 1935 (R. 101). ere was no testimony by this man that he was told, er the effective date of the Act, viz., July 5, 1935, that re would be no union in the respondent's plant. Simi-y, the respondent's newspaper advertisement of June 1935 (Respondent's Exhibit 17, Petitioner's Brief, ge 74) could not be a violation of the Act.

Hough testified that a foreman named Irwin told n that there would be no union and that the officials the company would not meet with the Scale Commit-(R. 156). The petitioner says that this was not ied, but Irwin testified (R. 354) that he did not tell ugh that any official of the company had said that he uld not meet with the Scale Committee. That, per-os, is not a categorical denial of Hough's testimony, at least the petitioner's statement is not accurate.

However, what Hough was told could not constitute iolation of the Act under any circumstances unless in was authorized to speak for the respondent and ed within his authorization. There is absolutely no

evidence that Irwin was authorized to speak for the respondent other than that he had been a foreman before the strike, and that he was a foreman afterward. True, Hough testified that Irwin said he had come at the instance of Mr. Grabbe (Respondent's General Superintendent), but this hearsay evidence is the only evidence of Irwin's authorization to speak for the respondent other than the fact of his employment as foreman and it is axiomatic that agency cannot be proved by declarations of an alleged agent.

Little reliance should be placed on hearsay of this nature, because it is clear that strikers hostile to an employer could circulate among other strikers and make statements professedly on behalf of the employer that would amount to violations of the Act. Especially is this true where, in the petitioner's opinion (R. 385, 386), "Testimony of the foreman that they were not instructed by the respondent to solicit seems entitled to little or no weight." *The petitioner thus makes refutation of the hearsay testimony a practical impossibility by the inconsistency of first placing faith in the extrajudicial statements of persons when related to it via the hearsay route and then denying credibility to the statements of the same persons when they are testifying directly, and under oath.* The petitioner's ruling is obviously absurd in a case where the burden to show authority was clearly on the complainant for the alleged agent held a position which would under no circumstances allow him to determine or speak for the respondent on matters of policy.

However, even with the above mentioned hearsay in the record, there is no evidence of any kind anywhere in the case that reveals that the respondent authorized Irwin to do any more than solicit an employee to return

to work. An authorization to solicit men to return to work did not give Irwin authority to determine or announce policies for the respondent, and inasmuch as there is no evidence as to the scope of the authorization of Irwin, we submit that the petitioner's finding that the respondent told some of the strikers that there would be no union is not supported by the evidence. It is noteworthy that there was no other testimony as to any such attitude on the respondent's part, although the Union could have produced other witnesses if any there were.

C.

THE RESPONDENT WAS UNDER NO DUTY TO CONTINUE TO MEET WITH THE UNION ON JULY 23, 1935, AS NEGOTIATIONS TO SETTLE THE STRIKE HAD REACHED AN IMPASSE.

We have shown in the preceding section of our argument that there is no substantial evidence to support petitioner's finding that the respondent refused to bargain collectively with the Union on or about July 23, 1935. Assuming *arguendo* that the respondent had refused to meet with the Union, it was under no duty to do so at the date of the alleged refusal, since negotiations to settle the strike had reached an impasse. The Circuit Court of Appeals for the Fourth Circuit indicated in its opinion in *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board,* 91 F. (2d) 134, at 139, 140 (1937), that where an actual impasse has been reached in negotiations, an employer is not bound to bargain collectively with the representatives of his employees. The petitioner in its brief, pages 20 to 28, apparently concedes that the existence of an impasse relieves an employer from the duty to bargain collectively. Indeed, it would seem that such duty imposed by the Act must be qualified to that extent.

The petitioner argues, however, that no impasse existed on July 23, 1935, that would render future negotiations futile (Petitioner's brief, pages 27, 28). It argues that even though an impasse was reached at the meeting on June 11, 1935, conditions changed thereafter so that on July 23, 1935, there was no impasse. We submit that an actual impasse on the Union's demand for a closed shop was reached on March 23, 1935, the date of the strike, that it was still existing on June 11, 1935, and that there is nothing to show that either the Union or the respondent had receded from their respective positions on July 23, 1935, or thereafter. A complete history of the closed-shop demands of the Union is set forth at pages 6 to 9, *supra,* and we respectfully request this Court to examine that statement carefully, as well as the portions of the record referred to therein.

With reference to our contention that an impasse was reached, we wish to point out the fact that even the petitioner went no further in its findings of fact than to say;

> "It is equally consistent with the facts that this meeting (June 11, 1935) failed by reason of the Union's insistence on the closed shop or by reason of the respondent's insistence that it would make no agreement with the Union at all." (R. 390)

We respectfully submit that the Union's insistence on the closed shop demand was the fundamental reason for the breakdown of negotiations at the meeting just referred to, and that due regard for the facts of the case compels that conclusion. It must be remembered that the closed shop demand was the dominant theme throughout the negotiations between the respondent and the Union, as may readily be seen from the aforementioned statement, *supra,* at pages 6 to 9.

The petitioner, in its effort now to show that there was no impasse on the closed shop issue on June 11, 1935, has even gone to the length of overlooking the passage from its opinion that we have quoted above. It says, at page 26 of its brief:

> "The record makes it clear, however, that the Union took no inflexible stand, and that the failure of the conference to settle the strike cannot be traced to the Union's position on that matter."

Petitioner has sought throughout its argument to minimize the importance of the closed-shop issue. The petitioner says, at page 25 of its brief, that the financial secretary of the Union specifically testified that the closed-shop issue did not cause the strike, and cites pages 82 to 84 of the record to support its statement. At those pages of the record the testimony of Otis Cox is set out. The testimony that the petitioner relied on for support for its statement must be the following, beginning near the bottom of page 82:

"Q. Now at this meeting on June 11, 1935, who all was present?
A. Mr. Gorby, Mr. William Gorby, Mr. Grabbe, L. G. Brown, G. M. Heuer and myself.
Q. And didn't you say at this meeting that what the union wanted was a closed shop?
A. Not exactly in those words, no.
Q. Well, what did you say?
A. That was what we wanted when we came out.
Q. What did you say—
Q. (*By Trial Examiner Lyons*) What was your last answer?
A. That was our demands when the strike was called.
Q. Oh.
A. A closed shop.

Trial Examiner Lyons:
All right.

Q. (*By Mr. Jaburek*) And that was why the strike was called?

A. No, sir."

To argue that the demand for a closed shop did not cause the strike, but that that was the Union's demand when the strike was called, may be technically accurate but it detracts not at all from the significance of the closed shop demand in the case at bar. It could be said of practically any strike that it was caused, not because of the strikers' demands, but because the employer refused to grant the demands.

To return to the petitioner's argument at page 26 of its brief, we find that this statement is made:

"The closed shop question was undoubtedly discussed (R. 245-246, 300-301), but it is plain that the failure of the meeting is largely attributable to respondent's position that it would take all the strikers back without discrimination 'but without Union recognition or agreement.'"

And further, at page 27:

"But any impasse on this issue, as distinguished from the closed-shop issue, was necessarily resolved on July 5, when the Act became effective."

Going back to the finding of the petitioner (R. 390), quoted *supra* at page 32, it is clear that after July 5, 1935, the impasse which the petitioner admitted existed was confined to the closed-shop issue.[3] Let us briefly

3. The Union therefore had nearly 20 days between the passage of the Act and the day of the alleged refusal to bargain in which to notify the respondent that it desired to avail itself of its rights under the Act and that it would not insist upon a closed shop. That the Union did not do so seems to indicate both that it did not request a meeting on or about July 23, 1935, and that it had not abandoned its demand for a closed shop.

examine the argument advanced by the petitioner to show that through changing conditions the impasse on the closed-shop issue was terminated prior to the alleged refusal to bargain. The petitioner's argument, page 27 of its brief, consists first of a statement that the plant was reopening; that martial law had been declared and picketing forbidden; and that the respondent had solicited strikers to return to work, without any conclusion being drawn from such facts, and second, of the contention that the Union's approach to the respondent through conciliators demonstrated its conciliatory intention. With regard to the statement concerning declaration of martial law, etc., those facts certainly do not indicate that the Union had an intention of compromising on the closed-shop issue. As for the assumption, made first in the petitioner's decision at page 390 of the record, that the Union's approach through conciliators demonstrated its conciliatory intention, we submit that the petitioner's position is entirely unfounded. In the first place, there is nothing to show that the conciliators came on the scene at the request of the Union. In the second place, there is no dispute over the fact that the Union actually did ask Mr. Robert Mythen, a federal conciliator, to try to settle the strike on or about April 24, 1935 (R. 137, 138), some time prior to the meeting of June 11, 1935, when it repeated its closed-shop demand. It is entirely clear, therefore, that even if the Union did approach the respondent through conciliators on July 23, 1935, it is an unwarranted assumption for the petitioner to say that the Union's intentions were conciliatory and that further negotiations would yield a settlement by compromise. This is another clear example of evidence that at best merely gives equal support to inconsistent inferences, is therefore not substantial evidence, and does not support the petitioner's finding that in this case the respondent was

under a duty to continue to meet with the Union. *Appalachian Electric Power Co. v. National Labor Relations Board, supra.*

In this connection the alleged similarity (Petitioner's brief, pages 27, 28) between the case at bar and *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board, supra,* clearly is not controlling here. There the petitioner's finding that the alleged refusal to negotiate further was unreasonable and hence was an unfair labor practice, was deemed to be conclusive upon the Court because supported by substantial evidence, 91 F. (2d) 134, at 139, 140. Here there clearly was an impasse on the closed shop issue, and the petitioner's finding that the respondent could not have reasonably believed that further negotiations would have been futile has no substantial support in the evidence.

We respectfully submit that even had there been no impasse in negotiations, the respondent's refusal to meet with the conciliators and the Union was justified, for at that very time the respondent was busily engaged in resuming operations after a long and costly strike, and had its attention occupied by many matters of far greater importance than another discussion of the closed shop issue.

Point II.

The Strike Was a Violation of the Indianapolis Agreement and Terminated the Employment Status of the Strikers.

This point is the one upon which the decision of the Court below turns. We intend to show that the decision thereon was proper, and should be affirmed. However, the other points argued herein are equally decisive and a denial to the petitioner of enforcement of its order, we believe, rightly follows upon a consideration of any of the four main points of our argument.

A.

THE STRIKE WAS IN VIOLATION OF THE INDIANAPOLIS AGREEMENT.

The Indianapolis Agreement was entered into on July 14, 1934 and was to be effective for one year, that is until July 14, 1935. It was in full force and effect therefore until the occurrence of the strike on March 23, 1935, or until that date the Agreement had neither been modified, terminated, nor breached. In passing we wish to call to the attention of this Court a finding of the petitioner that bears on the matter under discussion. The petitioner found that many months prior to the date of the strike, the Union had given thirty days' notice of termination in accordance with the Agreement (R. 87). This finding, if such it can be termed, could only have been based upon the Union's letter of October 23, 1934, giving thirty days' notice of a request to *modify*, not to terminate, the contract (Respondent's Exhibit No. 11, printed at page 72 of petitioner's brief). There was no other such notice during the effective period of the contract and no notice whatever of termination.

Furthermore, this so-called finding totally ignores the fact that both parties to the Agreement continued to act under it for several months after the expiration of the thirty days specified in the aforesaid letter of October 23, 1934. It can only be characterized as a bold and entirely improper attempt on the part of the petitioner to justify the conduct of the strikers and to alleviate the natural consequences of their acts. The finding, having served its purpose in convincing the petitioner that it was right in its decision, has now conveniently been abandoned since it was too naked a fabrication to withstand judicial scrutiny. The petitioner's resort to such a deliberate misrepresentation of the facts should make this Court extremely careful in its examination to determine whether any of the other findings are supported by substantial evidence as is required by law, or whether they are the result of bias and prejudice.

The Court below found (R. 423), and we submit rightly, that the strike on March 23, 1935, was in violation of the Indianapolis Agreement. Its finding is based upon the fact that the Agreement contained this provision in paragraph 10, (R. 17):

> "In any case in which a satisfactory settlement of a dispute arising under this contract cannot be reached, such dispute shall be referred to a committee of arbitration composed of two persons selected by the Management, two persons selected by the Union, and fifth person to be selected by these four, who shall reach a decision which shall be final and binding upon both parties to this contract. There shall be no stoppage of work by either party to this contract, pending decision by the Committee of Arbitration."

The petitioner seeks to show that the provision banning stoppages of work was applicable only pending

arbitration, and that as the respondent refused to arbitrate upon the proposals of the Union, the provision did not become operative and the Union was free to strike (Petitioner's brief, page 38). This contention, we submit, cannot be supported. It is worthy of attention, however, because of its serious implications.

It is astonishing that the petitioner should advance an argument which means that employees who have entered into a contract through collective bargaining with their employer covering working conditions and other matters of mutual interest, by which they agree to abide for a definite period, can throw the contract overboard at will and still retain the status of employees and the right to insist that their employer bargain with them. Presumably, the primary object of the petitioner's existence is to encourage the making of fair collective bargaining agreements and not their breach, as does its decision in this case. Is it conceivable that in its zeal to support, in its judicial capacity, the contentions it has made in one or another of its numerous other capacities, the petitioner has overlooked this fundamental object of the Act? We realize that the wisdom of Congress in endowing the petitioner with various capacities is not a question with which this Court is presently concerned, but as the motive for a deed often serves as its best explanation we have thus digressed for a moment to offer a possible explanation for this amazing contention of the petitioner.

It seems to us clear beyond the necessity of demonstration that when an employer and his employees enter into a contract covering working conditions and setting up the standards by which their relations are to be governed for a specified period, each party is bound and, whether expressed or not, it is an implied condition of such an agreement that operations shall not be inter-

rupted by voluntary action on the part of employer or employees. If the agreement provides for means by which it may be modified, that of course leaves the door open for the introduction of changes. However, it seems to us that fundamentally the parties have said to each other: "Here is our agreement, we will work under these conditions for a year, and matters not covered herein are of no importance." The fact that disputes arising under the agreement are to be submitted to arbitration, while indicative of a peaceful philosophy, in realty is a non-essential. Its absence would not justify a strike to obtain other terms of employment than those agreed upon. A provision restraining stoppages of work pending arbitration likewise evidences the reasonable attitude of the parties, for by it they say that even in the important matters to which we have agreed we will employ the forces of reason in case of disagreement rather than cast our agreement aside. *How can it be said that the meaning of such a contract as here outlined is that one of the parties can avoid all of its obligations under its solemn agreement merely by engaging in a dispute with the other over a matter considered to be too unimportant to merit inclusion in the agreement?* This Court is aware of the many collective bargaining agreements covering thousands upon thousands of workers that are now in effect. Are the relations of those workers with their employers to be jeopardized by the adoption of the contention here advanced by the petitioner? We are confident that this Court will not lend its sanction to the promotion of such a subversive doctrine, but rather will adhere to the doctrine it has so recently announced in *Consolidated Edison Co. of New York et al. v. National Labor Relations Board,* No. 19 October Term, 1938, wherein Mr. Chief Justice Hughes said:

> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. * * *

> Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce."

The finding of the Court below that the strike of March 23, 1935, was in violation of the Indianapolis Agreement could well have been buttressed by additional facts established by the record. In our statement, *supra,* pages 6 to 9, we have referred at length to the testimony that shows conclusively that the only real dispute was involved in the Union's demand for a closed shop. The petitioner's contention to the contrary is so overwhelmingly refuted by the uncontradicted testimony as not to deserve serious consideration. The respondent's refusal to accede to the closed-shop demand, because the open-shop principle was incorporated in the then effective agreement, resulted in the strike resolution of March 17, 1935, quoted *supra* at page 3. The language of that resolution needs no interpretation; it stated unequivocally that the Union would not work in an open shop after March 23, 1935 and the strike occurred on that very day.

Therefore, in addition to the violation of the anti-strike arbitration clause, upon which the Court below based its decision, the Union violated a fundamental implied condition of collective bargaining agreements and its own expressed agreement to accept the open-shop principle for the effective period of the contract.

B.

THE STRIKE WAS UNLAWFUL AND THEREFORE OPERATED AS A TERMINATION OF THE EMPLOYMENT STATUS OF THE STRIKERS.

We have just shown that the strike of March 23, 1935, constituted a breach of the Indianapolis Agreement. It was therefore unlawful. We turn now to a consideration of the effect of an unlawful strike on the employment status of the strikers. We admit, as the Court below has stated (R. 420), that even prior to the passage of the Act, a strike did not ordinarily interrupt the employment status of strikers. Starting from this premise, the petitioner reasons that in every case strikers continue *under the Act* to be employees as long as the labor dispute in which they are engaged is current, because, petitioner argues, to hold otherwise would frustrate the purposes of Congress. This does not follow. The petitioner while seeming to meet our argument, by quoting the definition of the term "labor dispute" as used in the Act, actually avoids our argument entirely.

The strike occurred in March, 1935. The critical question is, what was the effect of that strike? We submit that the strike, not being an ordinary strike, but being rather an unlawful, illegal strike, in violation of a fair collective-bargaining agreement, then and there on March 23, 1935, terminated the employment status of the strikers. What does it matter that Congress, months later, passed a law that contained a definition of "labor dispute" that might be said to include an ordinary strike that was still in effect? Let us repeat, the question is whether the strikers were employees after they quit work on March 23, 1935, in breach of their contract. We submit that under the then existing law they were not.

In *Michaelson et al. v. United States ex. rel. Chicago, St. P. M. & O. Ry. Co.*, 291 Fed. 940 (C. C. A. 7th, 1923) it was *specifically ruled that participation in an unlawful strike makes men strangers to their former employer, that the refusal to work under such circumstances severs the workers from their jobs and that they no longer are employees of their former employer.* That decision of the Circuit Court of Appeals was reversed by this Court on the *ground that it was not necessary that the status of employment exist in order to bring into operation the provision of the Clayton Act for a trial by jury.* (266 U. S. 42). This Court did not disturb the ruling as to the effect of an unlawful strike. The petitioner in its brief in support of its Petition for Writ of Certiorari (pages 16, 17) cited language of the opinion of this Court in the *Michaelson* case as being applicable here. The slightest regard for accuracy would have shown that such language is not applicable to the decision of the Court below in the instant case. There this Court stated that the exclusion of railroad employees from the Clayton Act was not to construe that Act, but to engraft upon it an unwarranted exception. In the instant case the Court below did not exclude a class of employees from the terms of the National Labor Relations Act, and we do not contend that that should be done. What the Court below did say, and we submit rightly so, was that men who struck, prior to the passage of the Act, in violation of a fair collective bargaining contract ceased to be employees. The Act was not then in effect and could have no application, hence resort to a construction of the Act was neither indulged in nor, for that matter, required.

Point III.

Upon the Passage of the Act, the Strikers Were Not Employees and the Respondent Was Not Under a Duty to Bargain Collectively With Them.

Under this point of our argument our position is that since the strikers were not employees of the respondent, the Act imposed no duty upon the respondent to bargain with the Union because the passage of the Act could not convert the strikers into employees. The statement in the opinion of the Court below that the respondent violated its duty to bargain is not necessary to its decision, as its finding that the strikers were not employees precluded an enforcement of the petitioner's order.

A.

UNDER THE ACT THE DUTY IMPOSED UPON AN EMPLOYER IS THAT HE BARGAIN WITH THE REPRESENTATIVES OF HIS EMPLOYEES.

An examination of the petitioner's brief reveals that argument upon this contention is unnecessary. At page 16 of its brief, the petitioner concedes that if the strikers were not employees, the respondent was under no obligation to bargain with the Union.

B.

THE STRIKERS HAVING CEASED TO BE EMPLOYEES PRIOR TO THE PASSAGE OF THE ACT, WERE NOT TRANSFORMED INTO EMPLOYEES UPON ITS PASSAGE.

If this Court accepts the proposition that the unlawful strike of March 23, 1935, terminated the employment status of the strikers, and we submit that no other conclusion is reasonable, it is unnecessary for us to demonstrate that the passage of the Act could not trans-

form the strikers into employees of the respondent, as the impossibility of such an effect of a Federal law is self-evident. Therefore, we shall confine ourselves to an exposure of the defects in the petitioner's attempt to show that the strikers were employees after July 5, 1935.

In its argument the petitioner relies upon *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board, supra,* and *National Labor Relations Board v. Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9th, 1937), in both of which cases this Court denied certiorari. An examination of those cases indicates that they are not applicable here. In each, the present petitioner was held to have acted within its authority in ordering the reinstatement of *employees* to the jobs they had relinquished by striking prior to the passage of the Act. However, in those cases the strikes were ordinary strikes, not in violation of collective bargaining agreements, and under the law as it existed prior to the passage of the Act, the strikers continued to be employees during the active prosecution of the strikes. Those cases did not involve the question here presented, viz., whether the petitioner has authority to order the reinstatement of strikers who were not employees, or in other words, whether the Act can be said to have transformed non-employees at common law into employees under the Act.

The other cases cited by the petitioner at page 18 of its brief, except for *Michaelson v. United States,* 291 Fed. 940 (C. C. A. 7th, 1923), which, as we have shown (page 43, *supra*), supports the respondent's position, and *State v. Personett,* 114 Wn. 680, and *Uden v. Schaffer,* 110 Wash. 391, which do not involve persons on strike, do not merit special mention. The only bearing these other cases have at all on the case at bar is that they support that proposition which we readily admit,

viz., that at common law, an ordinary lawful strike did not terminate the employment status of the strikers. The cases cited by the petitioner indicate that it has entirely ignored the real issue, which must be resolved in its favor if it is to prevail in this case, and has spent its efforts in establishing a point upon which there is no disagreement.

In conclusion of this point of our argument, we wish to suggest that some light can be cast upon the question whether the strikers were employees after they unlawfully struck, by considering the case of a person who, prior to the passage of the Act, was discharged under circumstances which, after the passage of the Act, would constitute an unfair labor practice. Under the Act a person discharged as a result of an unfair labor practice continues to be an employee. A discharge under such circumstances, prior to the Act, ended the employment status and that status was not revived by the passage of the Act.[4] Similarly, a person whose contractual relations with his former employer were completely severed prior to July 5, 1935, should not have his status restored thereafter by the Act. There is no valid reason for saying that the Act is applicable in one case and not in the other. We do not believe this Court will assume that Congress contemplated that aid to those who unlawfully strike in violation of their solemn agreement, reached through collective bargaining, would do more to promote collective bargaining than would similar aid to an innocent worker who was unjustly discharged through a practice designed to defeat that desirable end.

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4. In fact, the petitioner has held that the fact that workers were discharged because of union membership prior to the passage of the Act could not be made the basis of a complaint against their former employer. See *Appalachian Electric Power Co. v. National Labor Relations Board*, 93 F. (2d) 985, 988 (C. C. A. 4th, 1938).

Point IV:

The Order of the Petitioner Is Not Within Its Powers Under the Act and Enforcement of the Order Was Properly Denied by the Court Below.

A.

THE ORDER DISREGARDS THE LIMITS UPON THE PETITIONER'S AUTHORITY.

A discussion of the nature and effect of the order of the petitioner must not be construed as an admission of the authority of the petitioner to enter any order in this case affecting the respondent. We think, however, that the order itself strongly indicates the general attitude of the petitioner and its bias in this matter and a consideration thereof may be helpful in determining the other issues in the case. We quote the order:

"ORDER.

On the basis of the findings of fact and conclusion of law and pursuant to Section 10, subdivision (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, the Columbian Enameling & Stamping Company, and its officers and agents, shall take the following action, which the Board finds will effectuate the policies of the Act:

1. Discharge from its employment all production employees who were not employed by it on July 22, 1935, and reinstate to the vacancies so created individuals who were so employed and have not since received substantially equivalent employment elsewhere and place the remainder of such individuals on a list to be called for reinstatement as and when their labor is needed.

2. Upon reinstating its employees as required in paragraph 1 of this order, shall cease and desist from refusing to bargain collectively with Enameling & Stamping Mill Employees Union, No. 19694, as the exclusive representative of the production employees employed by respondent in respect to rates of pay, wages, hours of employment and other conditions of employment.

3. File with the National Labor Relations Board on or before the thirtieth day from the date of service of this Order, a report in writing setting forth in detail the manner and form in which it has complied with the foregoing requirements."

We shall here discuss the first and second provisions of the order; the third obviously has no present significance. The first provision of the order requires the respondent to discharge all of its production workers who were not employed by it on July 22, 1935 and reinstate to the vacancies so created individuals who were employed by the respondent on July 22, 1935, with certain limitations required by the Act. Assuming, for the sake of argument only, that the respondent had any production employees on July 22, 1935, what does the order mean? The petitioner argued in its briefs in the court below, and argues in its brief in this Court, page 35, that the order does not mean what it says—that it merely requires the respondent to reinstate the strikers, discharging if necessary, to make room for the strikers, only those employees who were first hired after the Act had been violated. However, and this is an important matter for consideration, the petitioner gives this Court no aid in its consideration of whether the order as construed by the petitioner should be enforced. Assuming that the strikers continued to be employees, and also assuming that the respondent refused to bargain collectively with the Union, the petitioner itself found that

ere was no refusal to bargain collectively with the ion until *several days after July 23rd or 24th, 1935* . 386). The petitioner, this Court will notice, does thing at all to establish the date of the alleged refusal bargain. Gorby, when testifying as a witness for the titioner (R. 303-307), was asked the following ques-on:

"Now, Mr. Gorby, about the 23rd or 24th of July, 1935, did you have a conversation with either Mr. Richardson or Mr. Sheck, labor conciliators?"

Gorby answered:

"Yes, sir."

The following questions and answers appear in the cord at page 305:

"Q. Did you have any further conversation with either Mr. Richardson or Mr. Sheck about this subject subsequent to July the 23rd or 24th?

A. Sometime later, I do not know just how many days later—I could not tell you that—I called Mr. Sheck—or Mr. Richardson, and told him that I would not have any meeting with him or with the Scale Committee.

Q. And that may have been a day or so later, then, this time that we are talking about now—

A. Several days.

Q. —around about—

A. Well, it was several days later."

The word *"several"* means more than two but not ery many (Webster's New International Dictionary.) herefore, the incident that the petitioner has seized pon as a refusal to bargain occurred not earlier than uly 26th or 27th, 1935 and perhaps later. Why the etitioner has not openly abandoned July 22, 1935, the late stated in its order, is difficult to understand, except

that it apparently recognizes the respondent's right to fill the places of the strikers, even assuming that they were employees, up until the time of the commission of an unfair labor practice. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938).

We respectfully submit, therefore, that the Court below was correct in refusing to enforce the first provision of the petitioner's order for the foregoing reason, in addition to the fundamental reason that the strikers were not employees, and therefore the petitioner could not order their reinstatement.

The second provision of the order requires that the respondent, after reinstating the strikers as ordered, cease and desist from refusing to bargain collectively with the Union. Again assuming that the strikers continued to be employees, and that the respondent refused to bargain, with the Union, should the Court below have enforced this provision of the order?

We submit this part of the order is entirely outside the petitioner's authority. The duty of an employer under the Act is to bargain collectively with the representatives of a majority of its employees in a unit appropriate for the purposes of collective bargaining. The petitioner is empowered under the Act to order an employer to cease and desist from the commission of any unfair labor practice. The petitioner says that its "cease and desist" orders look to the future (Petitioner's brief, page 32). Its order, therefore, means that the respondent must cease and desist in the future from refusing to bargain with the Union. In other words, the respondent must bargain with the Union if it is requested to do so. The petitioner has thus ordered the respondent to do something it is not lawfully bound to do for its duty, as aforesaid, is to bargain with the rep-

resentatives of a majority of its employees, and the petitioner admitted in February, 1936 that it did not then know whether the Union did represent a majority (R. 391).

B.

NO PART OF THE PETITIONER'S ORDER WILL EFFECTUATE THE POLICIES OF THE ACT.

We have heretofore shown that the petitioner's order should not be enforced because of the fact that the strikers ceased to be employees. We have also shown that even if the strikers could be deemed to be employees of the respondent, the petitioner's finding that the respondent violated the Act is not supported by substantial evidence. We have likewise examined the order in light of the petitioner's authority and have shown that the action required cannot lawfully be the subject of an order against this respondent. Now we turn to a consideration of the question whether the enforcement of the order would effectuate the policies of the Act.

The petitioner is limited in ordering a respondent to take affirmative action to such action as will effectuate the policies of the Act. The cease and desist provision of the order does not require in terms the taking of affirmative action, but since it does contemplate the entering into negotiations by the respondent with the Union (an affirmative act), we shall also consider the second provision of the order under this heading, as well as the first provision of the order.

Whether the first provision be taken literally or as interpreted by the petitioner, it is clear that in order to carry it out, the respondent must discharge as many employees as it reinstates strikers. This follows from

the fact that the respondent cannot hire more men than it needs and would not hire less than such number. The respondent then must discharge, under the petitioner's order, men not employed by it on July 22, 1935 (or some other date if the order does not mean what it says) and reinstate men who went out on strike on March 23, 1935. In this way, says the petitioner, the *status quo* existing before the alleged refusal to bargain is to be restored. Of course, the petitioner does not desire that the *status quo* existing immediately before the alleged refusal to bargain be restored, because that would mean a restoration of the strike status—obviously undesirable. It also does not want to restore the *status quo* existing at the time when the respondent told the conciliators that it would not meet with them or with the Scale Committee because that would decrease the number of potential reinstatees, for the reason that even if the refusal communicated to the conciliators was an unlawful refusal to bargain with the Union, the petitioner could not require the respondent to discharge any persons hired prior to the alleged refusal to bargain. Therefore, the petitioner has required the restoration of a status existing months prior to the petitioner's creation, viz., the *status quo* prior to March 23, 1935.

What is the assumed justification for such an interference with the petitioner's business, and with the affairs of its employees? Merely the unsound, impractical, and highly prejudicial opinion of the petitioner that had the respondent attended the conference proposed by the conciliators,[5] the men on strike *might have been put back to work!* One cannot help but be shocked that a powerful regulatory body should countenance,

5. At page 391 of the record the petitioner seems to forget that it had found that the meeting was *requested by the Union.*

nuch less indulge in, such reasoning. Instead of asking his Court to shut its eyes to some of the plainest facts f daily existence, as has the petitioner, we ask this Court to view the extreme to which the petitioner has ere adventured in requiring action supposedly designed o effectuate the policies of an Act passed to promote, ot an unbridled interference with business by an administrative agency, but rather the orderly processes of ollective bargaining.

The petitioner argues at pages 30 to 34 of its brief hat the Court below misconstrued the Act in refusing o enforce the petitioner's order on equitable grounds ecause of the misconduct of the strikers. We wish to oint out that the remarks of the Court below that are riticized by the petitioner were not necessary to its ecision of the case as it is clear beyond question that he point upon which the decision turned was that the trikers terminated their employment status by striking, rior to the passage of the Act, in violation of their contract with the respondent.

The petitioner's citation of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, nd *Agwilines, Inc., v. National Labor Relations Board,* 7 F. (2d) 146 (C. C. A. 5th, 1936), do not indicate that different result should have been reached by the Court elow. It did not decide that the rights sought to be nforced were private rights. It held that the strikers vere not employees, and had no rights under the Act. Ve do not contend that the proceeding is an equitable ne as stated by the petitioner at page 31 of its brief, o that the cases, *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2nd, 938) and *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th, 1937), cited

by the petitioner to the contrary need not be discussed at this point. It seems sufficient to say that their holding that misconduct of employees does not affect their rights under the Act does not conflict with a decision that holds that persons who struck before the Act, in violation of their contract, were not employees.

Even though the Court below might have been in error in indicating that the order should not be enforced for reasons of equity, we submit that its remarks must have been prompted by the obvious injustice of the drastic nature of the petitioner's order based upon a single alleged refusal to bargain after the long course of collective bargaining meetings in which the respondent had participated in good faith and also by the extreme and unusual hardship upon both the respondent and its present employees incident to enforcement of the order at a time so remote from the strike and from the alleged refusal to bargain. We submit that it is proper to suggest that even though "employees" cannot be estopped because of their misconduct, the petitioner may be barred through its laches in seeking enforcement of its order. As is pointed out elsewhere in this brief, the long delay of the petitioner in seeking enforcement of its order was of its own choosing. We submit that it is clear beyond question that an order, proper when made, may become clearly improper if its enforcement is delayed. If the delay in petitioning for enforcement is attributable to the petitioner, the petitioner should suffer the consequences should enforcement of the order become impossible, unfeasible or unjust. In this connection, we call to the Court's attention the policy of the Act for expeditious enforcement of the orders of the Labor Board as incorporated in section 10 (1) viz. "Petitions (to Circuit Courts of Appeals)

filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed."

Enforcement of the order could not conceivably effectuate the policies of the Act. The primary policy of the Act is to promote collective bargaining in order to restore equality of bargaining power between employers and employees so that certain obstructions to the free flow of commerce can be eliminated or at least mitigated (Section 1 of the Act). "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." *Consolidated Edison Company of New York et al. v. National Labor Relations Board, supra.* With respect to the petitioner's authority to order affirmative action, this Court, in the case just cited, said:

> "* * * We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."

Assuming that the respondent did refuse to bargain with the Union, we respectfully submit that the order to reinstate the strikers is punitive, would not effectuate the policies of the Act, and should not be enforced. We have heretofore shown that the strike of March 23, 1935 was in violation of a collective bargaining agreement. We have likewise shown that the respondent offered to take all of the strikers back without discrimination and that many of them did return to work between July 23, 1935 and the second week of September, 1935. Is not the reinstatement order obviously punitive? The respondent had not refused to take the strikers back as the peti-

tioner well knew. If the respondent had discharged men in violation of the Act, or had illegally refused to take back strikers, an order to reinstate the men involved would be clearly remedial, for that would correct the wrong done to the men. Where the wrong is a refusal to bargain with the proper representative, the remedy should be an order to bargain with the proper representative at the time of the order. It is clearly a punishment to order reinstatement of strikers who did not choose to return to work when they had the opportunity to do so, and when the only wrong alleged is a refusal to bargain with them. The wild assumption (R. bottom of page 391, top of page 392) upon which the petitioner attempts to justify the order, as we have shown, indicates its impropriety: its condemnation is completed by the fact that it does not right a wrong, but imposes an unreasoning and revengeful punishment.

The petitioner cites several cases at pages 35 and 36 of its brief to support its argument that reinstatement of the strikers was the appropriate relief to order in this case. All of the cases cited can be distinguished from the instant case, and we submit, do not indicate that the reinstatement of the strikers would here be appropriate.

In *Black Diamond S. S. Corp. v. National Labor Relations Board*, 94 (2d) 875 (C. C. A. 2d, 1938), in addition to a refusal to bargain, there was an improper *refusal* to reinstate the strikers upon a termination of the strike. The relief there ordered was appropriate, as it was a correction of a situation caused by the employer, but the case is no authority for the decision of a case in which there was no improper refusal to reinstate strikers.

National Labor Relations Board v. Remington Rand, Inc., 94 F. (2d) 862 (C. C. A. 2d, 1938), like-

wise is inapplicable to the present case. In that case the strike resulted from the employer's refusal to bargain. Reinstatement of the strikers was appropriate relief because the effect of the order was to correct a situation directly traceable to the respondent's conduct.

An examination of the opinion in *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th, 1937), indicates that the Court there was influenced by the fact that the refusal to bargain prolonged the obstruction to commerce—the employer was not able to obtain a full quota of employees. However, it apparently was not argued that reinstatement was not appropriate relief, as the Court did not consider the petitioner's order there from that standpoint. Had the argument been made, we feel that a different result would have been reached. In addition, in that case the strikers were not out of work as a result of their breach of contract; the strike resulted when contract negotiations broke down. Furthermore there was a clear refusal to bargain which does not exist in the case at bar.

The enforcement of the reinstatement order in *National Labor Relations Board v. Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9th, 1937), likewise fails to support the argument that reinstatement of the strikers here is an appropriate remedy. In that case, the strike was at least in part due to the fact that the employer there met with the union only to conceal its actual refusal to bargain. There was no contract in effect in that case; the employer's refusal to bargain having prevented the arrival at any agreement. Moreover the strikers were refused reinstatement after the strike unless they signed so-called "yellow dog" contracts. That was an illegal qualification upon the offer of reinstatement, which offer, in addition, was only to be open for

a few days. The natural result of the employer's conduct was to keep a large number of the strikers from returning to work, so that an order of reinstatement was needed to remove the effect of the respondent's conduct—an effect not primarily the result of a failure to bargain, but rather of a practical refusal to reinstate those entitled to return to work.

National Labor Relations Board v. Biles Coleman Lumber Co., 98 F. (2d) 18 (C. C. A. 9th, 1938), is the last case cited by the petitioner on this point. That case involved a strike that resulted directly from the employer's refusal to bargain with a union. The men having left their jobs because of the refusal to bargain, reinstatement of the strikers was necessary to right the wrong committed by the employer, and hence was appropriate relief.

Another consideration merits attention in this connection, viz., the fact that the strikers in the case at bar would have relinquished no rights whatever under the Act, had they returned to work when work was offered. If the respondent had refused to bargain with them, charges could have been filed, a complaint issued and hearings held. If the petitioner had found a violation of the Act, it could have issued an order designed to prevent violation. But the men would have been at work all that time. *The petitioner's order encourages strikers to prolong a dispute by staying out on strike, rather than to rely upon the orderly processes of the Act.*

We now turn to what we submit is a very serious phase of the question whether the reinstatement order would effectuate the policies of the Act. We here concern ourselves with a consideration of the effect of reinstating strikers who wilfully violated their collective

bargaining agreement. How can the petitioner carry out the purpose of Congress in passing the Act by saying to the tens of thousands of employees now working under collective bargaining agreements with their employers, "If you are not satisfied with the conditions you have agreed to, and would like some other conditions, we will protect you in the event that you strike, for if we can find that your employers have committed any violations of the Act whatever, we will order them to reinstate you in case you lose your strike"? We submit that when the petitioner's order is read in view of the facts of this case, it directly encourages violation of contracts and seriously tends to nullify the beneficial purposes of the Act. The mere statement in the petitioner's brief at page 40, that, "The contention is without merit," is no answer to such a serious charge.

We do not question the proposition advanced by the petitioner at page 36 of its brief, to the effect that the affirmative relief to be ordered is a matter for it to determine in its "judgment and discretion." We do, however, insist that the petitioner's "judgment and discretion" are subject to the limitation that the relief ordered be remedial and not punitive. As we have shown, the relief here ordered, viz., reinstatement of the strikers, is punitive, and hence exceeds the aforesaid limitation.

It should be noted, we think, that the petitioner has sought to excuse the strikers by saying that the strike, at most, was a technical breach of contract which they believed the respondent was breaching (Petitioner's brief, page 38). The appellation "technical" does not make the strike any less serious a breach. To say as the petitioner does, at page 40 of its brief, that an employer has various familiar remedies against breaches of contract to which he may resort to prevent employee actions which might promote industrial strife, is to evade

the question. The question is not, "what can an employer do when his workers violate their collective bargaining agreement?" The question is "Should the petitioner enter an order that will encourage workers to violate their agreements?" If the reinstatement of the strikers in this case would remove the effects of an unfair labor practice, enforcement of the order might possibly be worth the great risk. But, since the order is merely to punish the respondent, and rights no wrongs resulting from any unfair labor practice, the petitioner must not prevail.

The time element in this case is also one that deserves the attention of this Court. As we have indicated elsewhere in this brief, it is nearly four years since the men went out on strike, and nearly three and a half years since they could have returned to work. The reinstatement of the strikers will require the discharge of men who have worked for the respondent since July 1935, to make room for men who voluntarily left their jobs four years ago and then refused to accept them back nearly three and a half years ago. This Court well knows that industrial processes are constantly changing with the introduction of new methods, machines and products. The reinstatement of the strikers at this time, even though once justified, would be unwarranted now when the probable effect would be a serious disruption of the respondent's business, inasmuch as the petitioner has been responsible for the undue delay in bringing this case before the Court below, and now before this Court.

We now turn to consider whether the second part of the order, viz., the "cease and desist" provision, will effectuate the policies of the Act. We have already shown that the order was improper because the peti-

tioner did not know in February 1936 whether the Union represented a majority of the respondent's employees. Certainly at this late date, no one knows whether the Union represents a majority of the respondent's employees, and this is true, even assuming that the respondent had reemployed all the strikers directed to be reinstated.

We submit that the enforcement of the order, far from effectuating the policies of the Act, would lead to confusion and discord. What the petitioner should have ordered, we submit, was an election to determine the proper representative, with a provision, assuming that the respondent had refused to bargain with the Union, to cease and desist from refusing to bargain with the representative selected by the employees in the election. Enforcement of the petitioner's order could very easily lead to trouble, and it is practically certain to deny the respondent's employees the right to bargain collectively with the respondent through representatives of their own choosing.

Conclusion.

It is respectfully submitted that the judgment of the Court below denying enforcement to the petitioner's order, was entirely proper, both for the reasons stated in its opinion and for the additional reasons stated hereinabove, and should therefore be affirmed.

Respectfully submitted,

EARL F. REED,
OTTO A. JABUREK,
CHARLES M. THORP, JR.,
Attorneys for Respondent.

2812 Grant Building,
Pittsburgh, Pa.

APPENDIX.

Respondent's Exhibit No. 13.

ENAMELING & STAMPING MILL EMPLOYEES

Union No. 19694

TERRE HAUTE, INDIANA.

2335 North 12th St.
Terre Haute, Ind.
January 1, 1935.

Columbian Enameling & Stamping Co.,
Mr. Werner Grabbe, Gen. Mgr.

Dear Sir:

It is the wish of your employes represented by Union #19694 that you meet the representative committee of that body at your earliest convenience.

Matters to be discussed are in substance:

(1) Condition of unrest and its alleviation,
(2) Production loss, causes and partial elimination thereof,
(3) An earned partial wage increase.

Yours truly,

M. G. HEUER,
Chairman.

Petitioner's Exhibit No. 4.

ENAMELING & STAMPING MILL EMPLOYEES

Union No. 19694

TERRE HAUTE, INDIANA.

1518 Beech St.
Terre Haute, Ind.
June 7, 1935

Mr. C. B. Gorby, Pres.
Columbian Enameling & Stamping Co.,
Terre Haute, Ind.

Sir:

The members of Local Union #19694 have been and are desirous of meeting the management in a sincere effort to come to some satisfactory termination of the controversy existing between the employees and management of your company.

Our representative, Mr. T. N. Taylor, has attempted to arrange a conference with the representatives of your company but without success. A group of public-spirited men, representing the Terre Haute Chamber of Commerce, the churches, the press, and labor, have been requested to arrange a conference between the management and the employees but have as yet been unsuccessful.

Our membership is convinced that no controversy is so great that cannot be settled across the conference table. A prolonged labor conflict is expensive to the company, the employees and the public generally, and with this thought in mind, we hereby request the representatives of the company to meet with the undersigned at 2:00 P. M., Saturday, May 8, at any place designated by you for the purpose of starting and continuing conferences until a satisfactory settlement has been reached.

Trusting your company will comply with this request in the interest of all concerned and for the betterment of Terre Haute, we are,

Scale Committee

L. G. BROWN
M. G. HEUER
OTIS COX.

Petitioner's Exhibit No. 5.

ENAMELING & STAMPING MILL EMPLOYEES

Union No. 19694

TERRE HAUTE, INDIANA.
September 20, 1935

Columbian Enameling And Stamping Co. Inc.
Mr. C. B. Gorby, Pres.

Dear Sir:

Acting in behalf of the Enameling & Stamping Mill Employees Union #19694 I am taking the liberty of asking you to arrange a meeting between representatives of the aforesaid organization and the Columbian Enameling & Stamping Co., for the purpose of trying to effect an amicable termination of the controversy that seems to exists between the two above named parties.

If such a meeting is agreeable to you and your fellow-directors, may I suggest that you notify us on or before Sept. 24th, designating the time and place such a meeting may be held.

Hoping for an early and favorable reply, I beg to remain

Respectively Your's

OTIS COX,
Acting Secretary
Enameling & Stamping Mill Employees
Union #19694

[SEAL]

Petitioner's Exhibit No. 6.

ENAMELING & STAMPING MILL EMPLOYEES

Union No. 19694

TERRE HAUTE, INDIANA.

415 N. 14th St.
Terre Haute, Ind.
October 11, 1935

Mr. C. B. Gorby, Pres.,
Columbian Enameling & Stamping Co.,
Terre Haute, Ind.

Dear Sir:

For almost seven months a controversy has existed between the Management and the empolyees of the Stamping Company. This misunderstanding has been expensive to the workers and, no doubt has been expensive to the Company. The workers have lost thousands of dollars that could have been theirs through pay envelopes had this controversy not occurred. The company could have maintained their regular output, continued friendly business relations and at least a small profit on their products. This controversy has been costly to both employer and employee. Granting that both sides have made mistakes we feel that the longer it continues the more both looses.

With this thought in mind we ask you, as representing one side of the controversy, to meet with the undersigned for the purpose of trying as real men should to bring about some kind of termination of the controversy.

We assure you that if you will consent to meet with us we will meet with an open mind ready and willing to cooperate with the management in bringing prosperity to the company and return pay checks to the workers.

We are sincere when we say to you we desire an early meeting with your Officers as we are thoroughly convinced that the termination of this controversy will relieve the tension in Terre Haute, thereby bringing more prosperity to the City as well as a direct benefit to both parties to this controversy.

Trusting we may have the pleasure of meeting with you in the near future, we are

Sincerely yours,

L. G. BROWN
M. G. HEUER
OTIS COX.